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No. ..., October Term, 1962

In The

Supreme Court of the United States

SAMUEL VOLTAGGIO,

Appellant,

vs.

NICHOLAS V. CAPUTO, COUNTY CLERK, COUNTY OF ESSEX, STATE OF NEW JERSEY and ROBERT J. BURKHARDT, SECRETARY OF STATE, STATE OF NEW JERSEY,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

JURISDICTIONAL STATEMENT.

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On Appeal from the United States District Court for the District of New Jersey.

JURISDICTIONAL STATEMENT.

Appellant, Samuel Voltaggio, appeals from the Order of a Three Judge Court of the United States District Court, District of New Jersey, entered on September 18th, 1962, dismissing appellant's complaint and denying the relief prayed for therein. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINION BELOW.

The opinion of the Three Judge Court of the United States District Court, District of New Jersey is not yet officially reported, nor is it unofficially reported.

JURISDICTION.

This is a suit brought in the United States District Court, District of New Jersey, by appellant, Samuel Voltaggio, to have seven (7) sections of Title 19, *Elections*, N. J. Rev. St., declared unconstitutional and void under the Constitution of the United States, to have the defendants restrained from enforcing the aforementioned sections and for such other relief as the Court may find just. This action is brought pursuant to Title 28, United States Code, Section 1343 (3) which confers original jurisdiction on the Federal District Court.

> "* * * To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress provided for equal rights of citizens or of all persons within the jurisdiction of the United States; * * *" 71 Stat. 637 (1957).

On September 14, 1962, a three judge court, convened pursuant to Title 28, U. S. Code, Section 2281, and on that same date, at 3:45 P. M., filed an order dismissing the complaint and denying the relief sought therein. Said order was entered on September 18, 1962. A Notice of Appeal was filed in the Federal District Court, District of New Jersey, on September 17, 1962.

The jurisdiction of the Supreme Court of the United States to review the decision of the Federal District Court

on appeal is conferred by Title 28, United States Code, Section 1253.

The following decisions sustain the jurisdiction of the Supreme Court of the United States to review the decision on appeal in this case:

Baker v. *Carr*, 369 U. S. 186 (1961);
Florida Lime & Avacado Growers, Inc., v. *Jacobsen*, 362 U. S. 73, 80 S. Ct., 568, 4 L. Ed. 2d 568 (1960);
MacDougall v. *Green*, 335 U. S. 281, 69 S. Ct. 1, 93 L. Ed. 3 (1948).

The following statutes are involved in this appeal, all of which are printed in Appendix "A" to this Statement:

New Jersey Laws of 1930, Chapter 187, sec. 113, p. 721; N. J. Rev. St. 19:13–4.

New Jersey Laws of 1930, Chapter 187, sec. 139, p. 733 (as amend. L. 1947, c. 104, p. 520, sec. 2; N. J. Rev. St. 19:14–6.

New Jersey Laws of 1930, Chapter 187, sec. 141, p. 735 (as amend. L. 1951, c. 315, p. 1120, sec. 1); N. J. Rev. St. 19:14–8.

New Jersey Laws of 1930, Chapter 187, sec. 142, p. 736 (as amend. L. 1951, c. 315, p. 1121, sec. 2); N. J. Rev. St. 19:14–10.

New Jersey Laws of 1930, Chapter 187, sec. 144, p. 737 (as amend. L. 1942, c. 50, p. 281, sec. 7; L. 1948, c. 2, p. 40, sec. 21; L. 1949, c. 207, p. 677, sec. 1) N. J. Rev. St. 19:14–12.

New Jersey Laws of 1935, Chapter 302, sec. 6, p. 949, suppl. to L. 1930, c. 187, p. 671 (as amend. L. 1940, c. 137, p. 301, sec. 1; L. 1941, c. 163, p. 519, sec. 1; L. 1944, c. 127, p. 350, sec. 1; L. 1945, c. 70, p. 348, sec. 1; L. 1946, c. 17, pp. 48, 50, secs. 1, 2; L. 1948, c. 240, p. 1081, sec. 1) N. J. Rev. St. 19:49–2.

QUESTIONS PRESENTED.

1. Whether a state statute, which requires all elective candidates, to the office of member of the House of Representatives, to use a political slogan on the official general election ballot, but denies an independent candidate the right to use a slogan which consists in a noun, pronoun or derrivative of the name of a political party, recognized by statute, denies the independent candidate of the equal protection of the law which is guaranteed by the 14th Amendment of the Constitution of the United States?

2. Whether a series of state statutes awarding first choice of position on the official ballot to political parties, in a General Election of candidates to the House of Representatives, and subsequent second choice positions to an independent candidate:

(a) exceeds the powers delegated to the States by U. S. Const., Art. I, Sec. 4, to regulate the manner of such elections?

(b) denies the independent candidate of the equal protection of law guaranteed by the 14th Amendment of the Constitution of the United States?

(c) deprives the independent candidate of his liberty without due process of law and thereby violates the 14th Amendment of the Constitution of the United States?

3. Whether a state statute, delegating to a County Clerk discretion to select ballot positions among independent candidates in a General Election of candidates to the House of Representatives, violates the Constitution of the United States in that it:

(a) exceeds the powers delegated to the states to regulate the manner of election by re-delegating that power?

(b) delegates discretion to a ministerial officer?

(c) fails to set forth a sufficient standard to limit the scope of the authority delegated to the County Clerk?

STATEMENT OF THE CASE.

Samuel Voltaggio, the appellant, of No. 358 South Orange Avenue, South Orange, New Jersey, is a resident in the 11th Congressional District of the State of New Jersey. He is currently a candidate for election to the House of Representatives, as Representative from his district, having been nominated by direct petition in accordance with Chapter 13, Art. 2 of Title 19, New Jersey Revised Statutes.

Within the time so provided, plaintiff filed his petition with the defendant, Robert J. Burkhardt, the Secretary of State, of the State of New Jersey. With this petition was filed a request that, his principles or slogan, "Life Long Democrat", be printed below his name on the official ballot of the General Election to be held on November 6, 1962. This request was denied by Secretary Burkhardt. A similar request and demand was sent to Secretary Burkhardt, by mail, who again refused to comply therewith, resting his decision on N. J. Rev. St. 19:13-4 which prohibits a candidate from using as a principle or slogan the name of a political party or a noun, pronoun or derivative thereof, which is entitled to participate in the primary election. The Democratic Party was so entitled to participate in the Primary Election and it was upon this fact that Secretary Burkhardt rested his denial.

Upon a review of N. J. Rev. St. 19:14-6; 19:14-8; 19:14-10; 19:14-12 and 19:49-2, plaintiff has observed that as an independent candidate he is not permitted an equal opportunity along with candidates nominated by major political parties to draw lots for first position on the official ballot for the general election. In substance, these five sections permanently reserve, to those political parties which poll 10 percent of the vote cast at the next preceding election for members of the General Assembly, the top horizontal rows on the machine ballots. Those political parties, who have nominated candidates, are permitted a drawing amongst themselves for the top positions. Then a separate

drawing is made among candidates nominated by petition, who will, in the order in which they are drawn, occupy positions subsequent to the first listed political parties. Thus the choice first positions, which will first meet the eye of the elector, are permanently secured to political parties solely upon numerical strength. Recognizing this disadvantage, plaintiff served written demand upon defendant, Nicholas V. Caputo, County Clerk of the County of Essex, State of New Jersey, that such equal opportunity for top ballot position be afforded him, which demand met with a negative reply, grounded in the purported authority granted to him by the above statutes.

A further study of N. J. Rev. St. 19:14–12 reveals that the appellee, Nicholas V. Caputo, as County Clerk, is empowered with discretion in positioning the names of the independent candidates on the official ballot for the General Election. There is no limit to appellee Caputo's power in *this regard, and he may, at his whim, select any position* for the plaintiff which may result in severe injury to plaintiff's candidacy. By written reply, Mr. Caputo has refused to offer appellant any equal opportunity along with other candidates to draw for first position.

On September 7, 1962, appellant commenced a Civil Action in the United States District Court, District of New Jersey, by filing a complaint and affidavit, alleging the above facts. This pleading urged that:

1. N. J. Rev. St. 19:13–4, prohibiting the use of the slogan "Life Long Democrat", exceeded the powers delegated to the States to regulate the manner of elections for members of the House of Representatives; denied him the equal protection of the laws granted under the Fourteenth Amendment of the United States Constitution; and deprived him of his liberty without due process of law under the Fourteenth Amendment of the Constitution of the United States; by virtue of the preference and advantages given to the major

political parties and the correspondent disadvantage to plaintiff.

2. N. J. Rev. St. 19:14–6; 19:14–8; 19:14–10; 19:14–12 and 19:49–2, granting first position to candidates of major political parties and subsequent positions to candidates nominated by petition, exceeded the powers delegated to the States to regulate the manner of elections for members of the House of Representatives, denied him the equal protection of the laws granted under the Fourteenth Amendment of the United States Constitution; and deprived him of his liberty without the due process of law required by the Fourteenth Amendment of the Constitution of the United States; by virtue of the preferences and advantages given to the major political parties and the correspondent disadvantages to plaintiff;
3. N. J. Rev. St. 19:14–12, delegating to the County Clerk the duty of positioning the names of candidates nominated by petition, exceeded the powers delegated to the States to regulate the manner of elections for members of the House of Representatives by re-delegating such discretionary powers; by delegating such discretion to a ministerial office and by delegating legislative power without adequate standards.

The complaint further alleged that an actual controversy existed and that there was no adequate remedy at law. The relief sought therein was for the convening of a Court as required by Title 28, U. S. Code, Section 2281; declaratory relief; injunctive relief and such other relief as the Court might deem just.

Upon the return day of an Order to Show Cause issued against defendants, on September 14, 1962, a Three Judge Court was convened and determined it had jurisdiction to hear and settle the controversy. Following a hearing in summary manner, with arguments presented by the attorney for the plaintiff, the Deputy Attorney General on

behalf of Secretary Burkhardt and County Counsel on behalf of the County Clerk, the Court rendered an oral decision to the effect that it had jurisdiction over the subject matter, that the relief sought should be denied and that the complaint should be dismissed.

The written decision of the Court is, as of the writing of this Jurisdictional Statement, unavailable in official form. The same is true of the Court's opinion.

THE QUESTIONS ARE SUBSTANTIAL.

This appeal raises questions touching upon fundamental constitutional issues with respect to the unexplored area of State regulation of general elections of candidates to federal office. Two substantial issues of State legislative power are presented. The first issue is concerned with the extent of the power of the State under Art. I, sec. 4, cl. 1 of the United States Constitution which grants powers to the States to regulate the manner of elections of members of the House of Representatives. The second deals with the protection afforded by the Fourteenth Amendment of the United States Constitution as against the legislative power of the State to regulate such elections.

These Acts of the New Jersey Legislature, on their face, grant preferences and advantages to one particular class of candidates to the resultant disadvantage of another class of candidates, within which appellant falls. In view of this apparent discrimination, it is felt that a *prima facie* case of unconstitutionality is presented. Therefore, it is urged that this Court should not affirm the decision below, nor dismiss this appeal, without argument on the merits of the case, at which time the unreasonableness of these Acts will be established.

Cases argued in this Court with respect to discriminatory state statutes governing elections, have considered the topics of racial discrimination, *Nixon v. Herndon*, 273 U. S. 536, 47 S. Ct. 446, 71 L. Ed. 759 (1927) and requisites to form a new political party, *MacDougall v. Green*, 335 U. S.

281, 69 S. Ct. 1, 93 L. Ed. 3 (1948). Of more recent date this Court decided the case of *Baker v. Carr*, 369 U. S. 186 which considered the application of the equal protection clause of the 14th Amendment to state legislative apportionment. It is submitted that the instant case is of equal and possibly greater weight and consequence, in view of the lack of precedent and the general importance of the questions raised.

Serious consideration by this Court is urged to settle these important matters concerning elections to federal office. The fundamental rights to vote for and be a candidate to such office are of such great consequence as to warrant this Court to spell out the exact scope of the state legislature's power, as that power relates to the controversy *sub judice*.

1. THE QUESTION OF NECESSARY AND INDISPENSABLE PARTIES, RAISED BY THE APPELLEES IN THE HEARING BELOW DID NOT OUST THE JURISDICTION OF THE COURT BELOW AND DOES NOT AFFECT THIS APPEAL.

At the hearing below, by means of brief and oral argument, appellees urged that the major political parties were indispensable parties and should have been joined. In rebuttal, your appellant urged that such political groups stood on no different a level of importance than the general electorate of the State; and occupied the status of proper parties only, in the determination of this case.

It is submitted that the interests of these major political parties cannot be distinguished from the interests of the general public. If the statutory provisions, presently under attack, are unconstitutional, then they are so *ab initio* and therefore no legal rights run in their favor which set their interests above and apart from those of other electors.

If the argument presented by appellee has merit, then it must follow that error was committed in not joining each and every candidate whose name is entitled to be printed on the official ballot and in addition thereto, those political groups and parties lesser in number, who are put at a dis-

advantage in the same manner as plaintiff is. But these persons are too numerous to join and would make the speedy relief sought by these proceedings virtually impossible.

The general purpose of the statutes here under attack, is to provide an organized machine ballot, properly displaying the names of the respective candidates. This is the very crux of the defense raised by respective counsel for the appellees. The rights of the major political parties and the general electorate are amply protected by the vigorous arguments on behalf of the Secretary of State and County Clerk. Therefore, the failure to join these parties was not such an error as to destroy the jurisdiction of the three judge court below.

Recognizing the importance of the issues raised, the Court below took jurisdiction over the subject matter, despite appellees' contentions on this point, and by its decision set forth judicial precedent. A denial of oral argument on this point in this Court would cast serious doubt as to the validity of that precedent.

2. THE QUESTION OF DENIAL OF EQUAL PROTECTION WITH RESPECT TO PARTY NAME AND PRINCIPLE IS SUBSTANTIAL AND IS DESERVING OF A REVIEW BY THIS COURT ON ORAL ARGUMENT.

A diligent and earnest research of legal authorities fails to reflect a precedent case which squarely touches upon the constitutional power of a state legislature to regulate party names and principles in elections for federal office. Yet the federal nature of the right plaintiff seeks to enforce by this suit, casts serious doubt upon the extent of that power. Surely there is a limit to such authority and yet no principle of law from either this Court or any other court discusses such a limit.

The issue has significant general importance when similar statutes of the sister states are examined. The statutes of Massachusetts, Mass. Gen. Laws, Ch. 53, sec. 8; New York, N.Y. Election Law, sec. 138 (2) and Pennsylvania, 25 P. S., sec. 2912, provide similar protection of the names of poli-

tical parties with reference to the ballot. Yet the precise constitutional question, here raised, has never been urged against these provisions. A complete argument and hearing before this Court could settle this uncertainty which, as above stated, has wide implications.

It was argued below that the purpose of such legislation is to properly identify and distinguish the various candidates. However, the wording of this Act of the New Jersey Legislature lends itself to a strict interpretation by the Secretary of State, which in turn, results in an absolute foreclosure of the use of a word in a political principle. This result bears no relation to the purpose of the Act and it therefore constitutes arbitrary and discriminatory action on the part of the appellee Secretary of State, which violates the basic equality so essential in our electoral process. The party name is not infringed upon, nor does confusion result from a departure away from strict interpretation of the statute. Thus, although the reason for the rule is satisfied, the rule itself continues to operate to the injury of the plaintiff.

The lack of necessity for the application and enforcement of this statute in the manner described above only adds emphasis to the need for full oral argument on the merits to adequately cover the issue of the reasonableness of its enforcement.

3. THE QUESTION OF THE CONSTITUTIONALITY OF THOSE ACTS OF THE NEW JERSEY LEGISLATURE PLACING THE MAJOR POLITICAL PARTIES IN FIRST POSITION ON THE OFFICIAL BALLOT IS A SUBSTANTIAL ISSUE OF CONSTITUTIONAL LAW WHICH SHOULD BE DECIDED UPON ORAL ARGUMENT BEFORE THIS COURT.

Your appellant considers this issue the most critical and important of all points raised by the pleadings and argument in the Court below. The five sections of Title 19, *Elections* under attack, grant and impose a special advantage upon the major political parties by permanently awarding them the first ballot position on the machine

ballot. No reason or purpose is stated in these acts to support such discrimination. Thus, serious doubt is at once cast upon these acts on their reading alone, which warrants full consideration on their merits.

Again, thorough research has failed to reflect any case in point which offers even the slightest hint of satisfactory solution. Such a fact only adds to the importance of a thorough evaluation of the contentions raised by this appeal, and an authoritative opinion by this Court.

In the hearing below, it was argued with much force by counsel for the appellees, that the preference shown was not of such significant import as to warrant judicial consideration. But this argument is strongly rebutted by the intricate and carefully laid scheme of preference in the five separate sections here under attack. Certainly the New Jersey Legislature considered the order of names of substantial merit to warrant the preference to be continually repeated in each of these sections.

Common sense dictates that the average voter, unfamiliar with the ballot and the machine itself, is very likely to hastily vote for the first named candidates solely by reason of their position. Thus the importance of equal right to draw for that position, takes on new meaning.

The general importance of the attack here made is even more amply illustrated by the existence of similar legislation in two sister states. See Mass. Gen. Laws, Ch. 54, sec. 42 and N. Y. Election Law, sec. 105. No case has been found which has considered the constitutionality of these provisions as is in the case at bar.

The Fourteenth Amendment provisions requiring equal protection of the laws and due process of law apply in the matter of political rights. *Davis* v. *Schnell*, 81 F. Supp. 872 (S. D., Ala. 1949) aff'd. 336 U. S. 933, 69 S. Ct. 749, 93 L. Ed. 1093 (1949). The right to relief under this Amendment is not diminished merely because the nature of the right sought to be enforced is political. *Swafford* v. *Hughes*, 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1943), rehearing denied in 321 U. S. 804, 64 S. Ct. 778, 88 L. Ed. 1090.

Necessity should be the underlying objective where the exercise of the legislative power results in injurious discrimination. True, this statute has as its purpose the formulation of an organized ballot to speed the large electorate in casting their vote. But can such a purpose serve as the necessity in this case, where another method, even more fair in its operation is open to Legislature. Drawing by lots is concededly an adequate assurance of equality in assigning ballot position. But the classification of those candidates has no basis in reason or necessity. Thus the very equality sought after through the mechanics of a drawing by lot is lost by the very enactments which make the drawing possible.

The purpose of our electoral system is to afford the general electorate an unhindered method of casting their vote for that person who in their mind possesses the best qualifications for the particular office at hand. To defeat that purpose through means of discriminatory legislation is tantamount to the very destruction of our constitutional government and replacing it with a government ruled, not by reason and justice, but by sheer weight of political allegiance to political parties who are more powerful in number.

It is sincerely urged that the validity of these statutes be submitted before this Court for oral argument.

4. THE QUESTION PERTAINING TO DELEGATION OF POWER TO THE COUNTY CLERK TO REGULATE THE MANNER OF FEDERAL ELECTIONS IS SUBSTANTIAL AND SHOULD BE CONSIDERED BY THIS COURT ON ORAL ARGUMENT.

The position of appellees in the Court below should immediately be pointed out by way of introduction to this issue. Appellees there urged that no discretion was vested in the County Clerk in respect to the ballot position of the candidate nominated by petition by virtue of N. J. Rev. St. 19:14-12.

Yet this Act, in part, provides:

> "* * * The position which the names of candidates, and bracketed groups of names of candidates nominated by petitions for all offices, shall have upon the general election ballot, shall be determined by the county clerks in their respective counties. * * *" (L. 1949, c. 207, p. 677, Sec. 1).

The contention that discretion exists is further strengthened by a case decided by the Appellate Division of the Superior Court of New Jersey, *Perry* v. *Guiliano*, 46 N. J. Super. 550, 135 A. 2d 24 (1957). In the *Perry* case the Court denied the plaintiff a writ in lieu of the prerogative writ of *mandamus* by reason of discretion vested in the County Clerk, saying:

> "* * * For the court to intervene by its power in lieu of mandamus, the converse must appear, namely, that the statutory duty of the clerk, clear and unmistakable, would dictate the course sought by the appellants. It is from this plateau of certitude only, that such prerogative or statutory authority of the court may be exerted, for where, as here, the Legislature has ordained no clearly stated course of duty, the court may not interfere with the exercise of the discretion reserved to the county clerk. * * *" 135 A. 2d 24, 27 (1957).

These quotations above furnish strong indication that at least a question of interpretation does appear as to the existence of the discretion so asserted in appellants pleading and argument, which interpretation should be considered in a plenary manner by this Court.

If a delegation of such power to regulate the manner of elections to the House of Representatives is found to be existent, then appellants positions is simply that the power is legislative in nature and non-delegable by the State Legislature under the rule of law laid down by this Court in

Schechter Poultry Corporation v. United States, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947 (1934). But the question concerning the nature of the power vested in the States by U. S. Const., Art. I, sec. 4, cl. 1 is as yet undecided. By the existence of this case, opportunity exists to explore the nature of this power and the limits upon the exercise of that power by the State Legislature.

DENIAL OF THE INJUNCTION BELOW WAS AN ABUSE OF DISCRETION.

Despite the decision of the three judge court, sitting below, on the merits, it is urged that that Court abused its discretion by reason of the discriminatory nature appearing on the very face of the statutes attacked, the federal nature of the rights sought to be enforced, and for the final reason that the Court could have issued an order requiring certain and definite action to be taken by the appellees in order to assure the plaintiff of the constitutional rights he there sought to enforce.

It is submitted that the unequal and discriminatory character of the six acts in question has been amply evidenced by a careful reading of their respective provisions and the vigorous argument aimed at substantiating the unreasonable and arbitrary application of those provisions. The abuse of discretion is thus directed first of all at the very merits of the case.

The right sought to be enforced is constitutional in nature and has its foundation in U. S. Const., Art. I, sec. 4, cl. 1. *Ex parte Yarbrough*, 110 U. S. 651 (1884). *United States v. Classic*, 313 U. S. 299 (1941). This principle serves to emphasize the importance of a review of the denial by the Court below to exercise its injunctive authority.

In argument below, counsel for appellant described to the Court the method sought to be utilized with respect to equal opportunity to draw for first ballot position. By the method suggested, two separate drawings would be made, for political party candidates and for candidates nominated by petition, respectively. These drawings would determine

the rows of candidates names to be occupied on a horizontal line. Then each row would submit to a third drawing to determine their respective vertical ballot positions. Such a method would preserve party and group integrity and yet would afford equal opportunity to draw for the choice positions on the ballot. Therefore, it is submitted that the Court abused its discretion in not affording injunctive relief corresponding to the above plan.

CONCLUSION.

For the reasons stated it is respectfully submitted that the Supreme Court of the United States hear oral argument on this appeal in a plenary manner.

Respectfully submitted,

ABRAHAM I. HARKAVY,
Counsel for Plaintiff-Appellant.
100 Evergreen Place,
East Orange, New Jersey.

PROOF OF SERVICE.

I, Abraham I. Harkavy, attorney for Samuel Voltaggio, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on OCT 16 1962 I served copies of the foregoing Jurisdictional Statement on the several parties thereto, as follows:

1. On Nicholas V. Caputo, County Clerk of the County of Essex, State of New Jersey, and Robert J. Burkhardt, Secretary of State of the State of New Jersey, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

To Nicholas V. Fernicola, Esq., attorney for appellee Nicholas V. Caputo, at Hall of Records, Newark, New Jersey.

To Arthur J. Sills, Esq., attorney for appellee Robert J. Burkhardt, State House Annex, Trenton, New Jersey.

APPENDIX "A"

New Jersey Laws of 1930, Chapter 187, sec. 113, p. 721.
N. J. Rev. St. 19:13-4.

19:13-4. Contents of petition

Such petition shall set forth the names, places of residence and post office addresses of the candidates for the offices to be filled, the title of the office for which each candidate is named, that the petitioners are legally qualified to vote for such candidates and pledge themselves to support and vote for the persons named in such petition and that they have not signed any other petition of nomination for the primary or for the general election for such office.

In the case of a petition or petitions nominating electors of president and vice president of the United States, the names of the candidates for president and vice president for whom such electors are to vote may be included in the petition or petitions, but the petition or petitions shall not include the names of any candidates for president or vice president who have been nominated at a convention of a political party as defined by this title.

The petition shall also state in not more than three words the designation of the party or principles which the candidates therein named represent; but such designation shall not contain the designation, name, derivative, or any part thereof as a noun or an adjective of any political party entitled to participate in the primary election.

The petition shall also include the request that the names of the candidates and their designations of party or principles be printed upon the ballots to be used at the ensuing general elections.

No such petition shall undertake to nominate any candidate who has accepted the nomination for the primary for such position. L. 1930, c. 187, sec. 113, p. 721.

New Jersey Laws of 1930, Chapter 187, sec. 120, p. 723 (as amend. L. 1947, c. 101, p. 502, sec. 2); N. J. Rev. St. 19:14-6.

19:14-6. Column designation; accompanying instructions

In each column, immediately below the six-point rule, shall be printed the proper word or words to designate the column, to be known as the "column designation."

In the columns at the extreme left shall be printed the name of each of the political parties which made nominations at the next preceding primary election, directly under which shall appear the words "to vote for any candidate whose name appears in the column below, mark a cross ×, plus + or check √ in the square at the left of the name of such candidate. Do not vote for more candidates than are to be elected to any office." Such columns shall be three inches in width.

The column next to the right of such columns shall be designated "personal choice," under which shall appear the words "in the blank column below, under the proper title of office, the voter may write or paste the name of any person for whom he desires to vote, whose name is not printed on this ballot, and shall mark a cross ×, plus + or check √ in the square at the left of such name. Do not vote for more candidates than are to be elected to any office." There shall also be the same instructions regarding electors of president and vice-president which now appear at the head of all other columns. This column shall be four inches in width.

The remaining column or columns, as the case may be, shall each be designated "Nomination by Petition," under which shall be printed the words "to vote for any candidate whose name appears in the column below mark a cross ×, plus + or check √ in the square at the left of the name of such candidate. Do not vote for more candidates than are to be elected to any office." These columns shall be four inches in width.

Below the column designations and accompanying instructions and not more than one and one-half inches below the six-point diagram rule and parallel thereto, shall be printed a six-point diagram rule extending across the entire ballot from one four-point rule to the other. As amended L. 1947, c. 104, p. 320, § 2.

Effective May 6, 1947.

New Jersey Laws of 1930, Chapter 187, sec. 141, p. 735 (as amend. L. 1951, c. 315, p. 1120, sec. 1); N. J. Rev. St. 19:14-8.

19:14-8. Arrangement of titles of office and names of candidates in party columns and personal choice columns

In the columns of each of the political parties which made nominations at the next preceding primary election and in the personal choice column, within the space between the two-point hair line rules, there shall be printed the title of each office to be filled at such election, except as hereinafter provided.

In counties having twelve or less freeholders, such titles of office shall be arranged in the following order: electors of President and Vice-President of the United States; member of the United States Senate; Governor; member of the House of Representatives; member of the State Senate; members of the General Assembly; sheriff; county clerk; surrogate; register of deeds and mortgages; county supervisor; members of the board of chosen freeholders; coroners; mayor and members of municipal governing bodies, and any other titles of office. In counties having more than twelve freeholders, such titles of office shall be arranged in the following order: electors of President and Vice-President of the United States; member of the United States Senate; Governor; member of the House of Representatives; member of the State Senate; members of the General Assembly; sheriff; county clerk; surrogate; register of deeds and mortgages; coroners; county supervisor; members of the board of chosen freeholders; mayor and members of municipal governing bodies, and any other titles of office. Above each of such titles of office, except the one at the top, shall be printed a two-point diagram rule in place of the two-point hair line rule. Below the titles of such offices shall be printed the names of the candidates for the offices.

The arrangement of the names of candidates for any office for which more than one are to be elected shall be determined in the manner hereinafter provided, as in the case of candidates nominated by petition.

When no nomination for an office has been made the words "No Nomination Made" in type large enough to fill the entire space or spaces below the title of office shall be printed upon the ballot.

Immediately to the left of the name of each candidate, at the extreme left of each column, including the personal choice column, shall be printed a square, one-quarter of an inch in size, formed by two-point diagram rules. In the personal choice column no names of candidates shall be printed.

To the right of the title of each office in the party columns and the personal choice column shall be printed the words "Vote for . . ." inserting in words the number of persons to be elected to such office. As amended L. 1951, c. 315, p. 1120, § 1.

Effective July 17, 1951.

New Jersey Laws of 1930, Chapter 187, sec. 142, p. 736 (as amend. L. 1951, c. 315, p. 1121, sec. 2); N. J. Rev. St. 19:14–10.

19:14–10. Nomination by petition columns; arrangement of titles of offices; groupings

In the column or columns designated as nominations by petition, within the space between the two-point hair line rules, there shall be printed the title of each office for which nominations by petition have been made.

In counties having twelve or less freeholders, such titles of office shall be arranged in the following order: electors of President and Vice-President of the United States; member of the United States Senate; Governor; member of the House of Representatives; member of the State Senate; members of the General Assembly; sheriff; county clerk;

surrogate; register of deeds and mortgages; county supervisor; members of the board of chosen freeholders; coroners; mayor and members of municipal governing bodies, and any other titles of office. In counties having more than twelve freeholders, such titles of office shall be arranged in the following order: electors of President and Vice-President of the United States; member of the United States Senate; Governor; member of the House of Representatives; member of the State Senate; members of the General Assembly; sheriff; county clerk; surrogate; register of deeds and mortgages; coroners; county supervisor; members of the board of chosen freeholders; mayor and members of municipal governing bodies, and any other titles of office.

Above each of the titles of office, except the one on the top, shall be printed a two-point diagram rule in place of the two-point hair line rule. Below the titles of each of the offices shall be printed the names of each of the candidates for each of such offices followed by the designation or designations mentioned in the petitions filed.

Immediately to the left of the name of each candidate, at the extreme left of the column, shall be printed a square, one-quarter of an inch in size formed by two-point diagram rules.

The names of candidates for any office for which more than one are to be elected shall be arranged in groups as presented in the several certificates of nominations or petitions, which groups shall be separated from other groups and candidates by two two-point hair line rules.

To the right of the title of each office shall be printed the words "Vote for _____." inserting in words the number of candidates to be elected to such office. As amended L. 1951, c. 315, p. 1121, § 2.

Effective July 17, 1951.

New Jersey Laws of 1930, Chapter 187, sec. 144, p. 737 (as amend. L. 1942, c. 50, p. 281, sec. 7; L. 1948, c. 2, p. 40, sec. 21; L. 1949, c. 207, p. 677, sec. 2); N. J. Rev. St. 19:14-12.

19:14–12. Drawing for position on ballot; procedure; public announcement; bracketing names

The county clerk shall draw lots in his county to determin. which columns the political parties which made nominations at the next preceding primary election shall occupy on the ballot in the county. The name of the party first drawn shall occupy the first column at the left of the ballot, and the name of the party next drawn shall occupy the second column, and so forth.

The position which the names of candidates, and bracketed groups of names of candidates nominated by petitions for all offices, shall have upon the general election ballot, shall be determined by the county clerks in their respective counties.

The manner of drawing the lots shall be as follows: paper cards, of the same size, substance and thickness, with the names of each political party written thereon, shall be placed in a covered box with an aperture in the top large enough to admit a man's hand and to allow the cards to be drawn therefrom. The box shall be well shaken and turned over to thoroughly intermingle the cards. The county clerk or his deputy shall at his office, draw from the box each card separately without knowledge on his part as to which card he is drawing.

The person making the drawing shall make public announcement at the drawing of each name, the order in which name is drawn and the office for which the drawing is made.

Where there is but one person to be elected to an office, the names of the several candidates who have filed petitions for such office shall be written upon cards of the same size, substance and thickness. The cards shall be placed in a covered box with an aperture in the top large enough to admit a man's hand and to allow the cards to be drawn therefrom. The box shall be turned and shaken thoroughly to mix the cards and the cards shall be withdrawn one at a time.

When there is more than one person to be elected to an office where petitions have designated that certain candi-

dates shall be bracketed, the position of such bracketed names on the ballot (each bracketed group to be treated as a single name), together with individuals who have filed petitions for such office, shall be determined as above described.

Any legal voter of the county or municipality, as the case may be, shall have the privilege of witnessing the drawing.

The name or names of the candidate or bracketed group of candidates first drawn from the box shall be printed directly below the proper title of the office for which they were nominated, and the name or names of the candidate or bracketed group of candidates next drawn shall be printed next in order, and so on, until the last name or bracketed group of names shall be drawn from the box.

The arrangement of names of any bracketed group of candidates for any office for which more than one are to be elected shall be printed in the same order on the ballot as they were arranged on the petition of nomination.

The drawing for the positions which the names of candidates and bracketed groups of names of candidates, nominated by petition for office, and for the columns which the political parties which made nominations at the next preceding primary election shall occupy upon the general election ballot, shall be held at three o'clock in the afternoon of the fiftieth day prior to the day of the general election. As amended L. 1942, c. 50, p. 281; § 7; L. 1948, c. 2, p. 40, § 21; L. 1949, c. 207, p. 677, § 1.

Effective May 23, 1949.

New Jersey Laws of 1935, Chapter 302, sec. 6, p. 949, suppl. to L. 1930, c. 187, p. 671 (as amend. L. 1940, c. 137, p. 301, sec. 1; L. 1941, c. 163, p. 519, sec. 1; L. 1944, c. 127, p. 350, sec. 1; L. 1945, c. 70, p. 348, sec. 1; L. 1946, c. 17, pp. 48, 50, secs. 1, 2; L. 1948, c. 240, p. 1081, sec. 1.) N. J. Rev. Stf. 19:49–2.

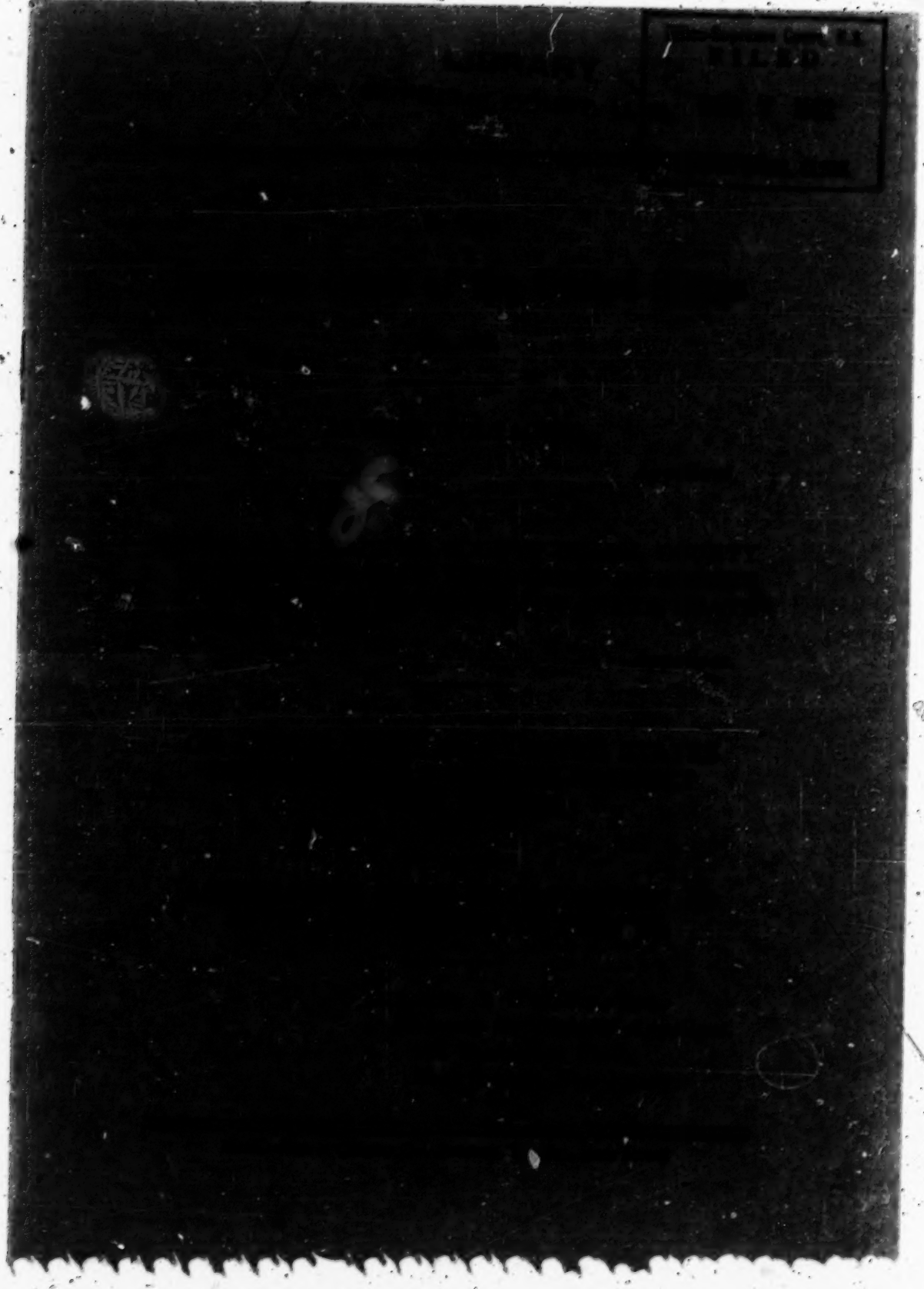
19:49-2. Printing official ballots; ballots in counties where voting machines are used; position of candidates' names on ballot

All official ballots shall be printed on clear white paper or cardboard of such form and size as will fit the ballot frames of the machines, printed in black ink in type as large as the space will reasonably permit; *provided, however,* that any public question which shall be placed on the ballot shall be printed in red ink and above any public question to be voted upon by the voters of the entire State there shall be printed, also in red ink, a description of the public question, which description shall not exceed six words and shall be printed in type as large as is practicable. Party nominations shall be arranged on each voting machine, either in columns or horizontal rows; the caption of the various ballots on the machines shall be so placed on the machines as to indicate to the voter what push knob, pointer, lever or other device is to be used or operated in order to vote for the candidates or candidate of his choice. The providing of the official ballots and the order of the precedence and arrangement of parties and of candidates shall be as now required by law; *provided, however,* that in those counties where voting machines are used; the specifications for the printing of the official ballots shall be drawn by the county clerk.

For the primary election for the general election in all counties where voting machines are or shall be used, all candidates who shall file a joint petition with the county clerk of their respective county and who shall choose the same designation or slogan shall be drawn for position on the ballot as a unit and shall have their names placed on the same line of the voting machine; *and provided further,* that all candidates for municipal or party office in municipalities in counties where voting machines are or shall be used who shall file a petition with the clerk of their municipality bearing the same designation or slogan as that of the candidates filing a joint petition with the county clerk as aforesaid, may request that his or her name be placed on the

same line of the voting machine with the candidates who have filed a joint petition with the county clerk as aforesaid by so notifying the county clerk of said county in writing within two days after the last day for filing nominating petitions and thereupon the county clerk shall forthwith notify the campaign manager of such candidates filing a joint petition as aforesaid of said request, and if the said campaign manager shall file his consent in writing with the said county clerk within two days after the receipt of said notification from said county clerk, the clerk of said county shall place the name of such candidate on the same line of the voting machine on which appears the names of the candidates who have filed the joint petition as aforesaid; *provided, also*, that any candidate filing a petition with the Secretary of State may request that his or her name be placed on the same line of the voting machine with the candidates who have filed a joint petition with the county clerk as aforesaid by so notifying the county clerk of said county in writing within two days after the last day for filing nominating petitions, and thereupon the county clerk shall forthwith notify the campaign manager of such candidates filing a joint petition as aforesaid of said request, and if the said campaign manager shall file his consent in writing with the said county clerk within two days after the receipt of said notification from said county clerk, the clerk of said county shall place the name of such candidate on the same line of the voting machine on which appears the names of the candidates who have filed the joint petition as aforesaid. As amended L. 1940, c. 137, p. [illegible]; 1: L. 1941, c. 163, p. 519, 1: L. 1944, c. 127, p. 350, 1: L. 1945, c. 70, p. 348, 1: L. 1946, c. 17, pp. 48, 50, 1, 2; L. 1948, c. 240, p. 1081, 1.

Effective July 16, 1948.



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IN THE

SUPREME COURT OF THE UNITED STATES.

SAMUEL VOLTAGGIO,
Plaintiff-Appellant,

vs.

NICHOLAS V. CAPUTO, County Clerk, County of Essex, State of New Jersey and ROBERT J. BURKHARDT, Secretary of State, State of New Jersey,
Defendant-Appellees.

Civil Action.

On Appeal.
Brief in Opposition to Appellee's Motion to Dismiss.

INTRODUCTION.

Appellant, Samuel Voltaggio, submits the within brief opposing the Motion To Dismiss This Appeal by Appellee, Nicholas V. Caputo, Essex County Clerk, State of New Jersey, upon the grounds that the movant has failed to adequately establish his position that the questions are not timely raised and that they are not substantial.

THE QUESTIONS ARE TIMELY RAISED.

In order to prevail on this point the appellee must show not only a delay, but also an injury to the interest of the County of Essex. In fact, any delay in prosecuting this civil action has worked in appellees' favor, rather than to their disadvantage.

The only party injured by the delay in prosecution was the appellant himself; and only he may raise a question of untimeliness. It is well to note that the period of delay complained of is a mere six months from the time appellant's nominating petition was filed with the Secretary of State. The appellee having failed to show an injury, has no standing to assert untimely prosecution.

Appellee's conclusion that the occurrence of the General Election on November 6, 1962 rendered the questions presented on this appeal moot is unsupported by legal authority, and ought not be considered by this Court in the absence thereof. A question rendered moot on appeal has been defined by the highest Court in New Jersey as one where an abstract question is sought to be determined, which is not based upon existing facts, but upon a factual conclusion unsupported by evidence in the particular case. *Funk & Wagnalls Co.* v. *Stamm*, 85 N. J. L. 301, 88 A. 1050 (E. & A. 1913). Even where a question appears to be moot in nature, an appellate tribunal will decide its legal effect where it touches upon the public interest in a substantial degree. *State* v. *Swift*, 101 N. H. 340, 143 A. 2d 114 (1950).

These vital questions of election law must eventually be settled. By this civil action and appeal, the plaintiff-appellant affords the opportunity for complete judicial settlement of questions which are of substantial importance and which face every candidate nominated by petition in the State of New Jersey and in other States. Within two

years time, a general election for the very same federal office will occur and independent candidates in that election will face the very same legal questions raised by this appeal. To dismiss this appeal, without opinion on the instant motion, creates grave uncertainty of the rights of candidates in future elections. These candidates in order to secure their rights will be forced to re-litigate these very same issues. Such a result constitutes multiplicity of suits, which is always a ground for the equitable relief here sought.

Appellant's lack of success in the November 6, 1962 General Election is not a factor rendering the appeal moot. Appellant fully intends, barring unforseen circumstances, running as a candidate in the next General Election for this same office. A dismissal of the present appeal would require him at that time to re-litigate the entire case, and at great personal expense. Therefore his rights as a candidate, remain in question and preclude the determination by this Court that the appeal be dismissed upon grounds of mootness.

THE QUESTIONS ARE SUBSTANTIAL.

The introduction by appellee of the issue of mootness, as in the question of untimeliness, is likewise unsupported by legal authority to sustain such a conclusion. Appellant again urges that that issue should not be considered unless appellee has established his legal right to a dismissal on this basis, which in fact he has failed to do. In response to the issue, the cases cited *supra* under the point regarding timeliness are offered in rebuttal.

This Court in *Baker v. Carr*, 369 U. S. 186 (1961) has held that a qualified voter has a sufficient interest to prosecute an action, the object of which is to declare the constitutionality of a State election law. Having conceded that appellant has that interest (Appellee's Brief p. 6), it is sub-

mitted that the occurrence of the election is no bar to the prosecution of this appeal. His legal rights as a voter are still at issue in an actual controversy and therefore the questions presented are not moot.

Appellants Jurisdictional Statement, p. 8, clearly reflects that the questions presented affect every voter in our nation and therefore this Court should not dismiss the appeal on a question of mootness in the face of such widespread importance. *State v. Swift*, 101 N. H. 340, 143 A. 2d 114 (1950).

The remainder of appellee's brief on this motion is devoted to a theory that the questions are not substantial (Appellee's Brief p. 4 *et seq.*). However, rather than argue the substance of the questions in an effort to disprove their importance, appellee devotes this portion of his brief to an argument of the merits of the case. Appellant's Jurisdictional Statement is specifically confined to the question of the importance of the questions presented, rather than an elaborate statement setting forth theories which bear on their legal solution. With this in mind, the following is a succinct rebuttal of the argument presented by Appellee's Brief, only insofar as the same relates to the substance and importance of the questions presented in Appellant's Jurisdictional Statement; inasmuch as this is the only question before the Court at this stage of the proceedings.

THE QUESTION OF DENIAL OF EQUAL PROTECTION WITH RESPECT TO PARTY NAME AND PRINCIPLE IS SUBSTANTIAL.

Notwithstanding appellee's argument on the merits of this point, the fact remains that this is a question of federal law which has yet to be passed upon, by this or any other Court. Appellee's argument fails to account for the wide scope of importance as evidenced by statutes similar to the

provision in question, enacted into law by our sister states. (Jurisdictional Statement, p. 10).

The case of *Ray* v. *Blair*, 343 U. S. 214 (1952) cited by the appellee, (Appellee's Brief, p. 6), does not minimize the importance of the question here presented. Nor would that case require plaintiff, by his vote in the primary election, to support *any* candidate in *any* election. Inasmuch as the appellant was not a party nominee, appellee's conclusion that New Jersey could require him to support the Democratic candidate, is a mere conclusion inaccurately drawn from the facts and holding of *Ray* v. *Blair, supra.*

No implication should be drawn from appellant's Jurisdictional Statement, that political parties are given an unrestricted right to use a political slogan, as is asserted by appellee (Appellee's Brief, p. 6). The problem presented is simply that the entire wording of the name of a political party is completely foreclosed from use in the slogans of other candidates; and this, is submitted to be a denial of the equal protection of the law. U. S. Const., amend XIV.

While the appellee concedes there is no case relating to the constitutional issue at hand, he asserts unauthoritatively in the very next sentence that a "constitutional minimum" exists. (Appellee's Brief, p. 7). Can these two statements be reconciled, or do they merely point to the confusing status of the issue and show the dire necessity of a judicial pronouncement on the merits? Appellant submits that plenary consideration would lend certitude with respect to this issue.

Although a voter might expect the name of a Democratic candidate to appear first on the ballot, appellee offers no legal authority to sustain its position (Appellee's Brief, p. 7) that that party has atained a prescriptive right to that position.

THE QUESTION PERTAINING TO DELEGATION OF POWER TO THE COUNTY CLERK TO REGULATE THE MANNER OF FEDERAL ELECTIONS IS SUBSTANTIAL.

As reflected in appellant's Jurisdictional Statement, p. 14, a fair question of interpretation exists as to whether discretion is vested in the Appellee-County Clerk to determine ballot positions of candidates in federal elections.

Despite appellee's contention that no discretion lies within the County Clerks authority, it cannot rebut the express language contained in *Perry* v. *Guiliano*, 46 N. J. Super. 550, 135 A. 2d 24 (1957) to the effect that such discretion exists. Likewise appellee overlooks the long line of decisions cited in support of that court's decision. See *Hawkes* v. *Gates*, 129 N. J. L. 5, 28 A. 2d 50 (Sup. Ct. 1942); *In re Hoffman*, 134 N. J. L. 155, 46 A. 2d 446 (Sup. Ct. 1946).

The case of *Smiley* v. *Holm*, 285 U. S. 355 (1932) is not decisive of the issue, *sub judice*. On the contrary, that case merely decided that a state legislature could not unilaterally, without benefit of normal legislative procedure, regulate the manner of federal elections. Appellant's position is in accord with that holding. What is sought here is a determination that the power to regulate is nondelegable in nature, and that its exercise must be by duly enacted statutes, rather than by the whim of a ministerial officer. As to appellee's statement of the purview of the authority of the State to delegate its law making function (Appellee's Brief, p. 12) it is well to note that such power is limited to a lawful delegation and one with adequate standards. *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947 (1934).

THE QUESTION OF THE CONSTITUTIONALITY OF THOSE STATUTES PLACING THE MAJOR POLITICAL PARTIES IN FIRST POSITION ON THE OFFICIAL BALLOT AND DENYING PLAINTIFF AN EQUAL OPPORTUNITY THERETO IS SUBSTANTIAL.

Although appellee adequately considers, and lauds, the New Jersey statutory scheme governing the recognition of a major political party (Appellee's Brief, p. 13), he fails to give a satisfactory and reasonable explanation for the patent discrimination on the face of the statutes here under attack, which preserve the first row positions to such major political parties on the ballot.

Can the legislature so favor major political parties in federal elections, without an adequate reason? It is appellant's position that the exercise of the legislative function must be based in reason and necessity. (Jurisdictional Statement, p. 11).

Reliance upon the *per curiam* opinion of this Court in *Mac Dougall* v. *Green*, 335 U. S. 281, 69 S. Ct. 1, 93 L. Ed. 3 (1948) does not conclusively decide the issues presented at bar. In the first place, three members dissented in an exhaustive and authoritative opinion. Secondly, a concurring opinion by Mr. Justice Rutledge was solely upon the ground that any injunction would interfere with the orderly process of the election in that case, by reason of only twelve days remaining between the date of decision and the date upon which the election was to be held. Since such a time consideration is absent in the case at bar, a decision upon the merits would afford this Court ample opportunity to render an authoritative opinion, which would strengthen the weakness in the *Mac Dougall* case, occasioned by this concurring vote.

Appellee offers other sections of the Revised Statutes of New Jersey, which provide for publication and distribution of sample ballots (Appellee's Brief, p. 14) as being indicative of the advantages afforded independent candidates. But these same provisions equally benefit the major poli-

tical parties as well. Furthermore they are an unsatisfactory explanation for the patent discrimination which results from the operation of these acts. They fail to supply a reason for such preferences.

The success of one candidate in an election in a foreign jurisdiction is offered to substantiate the conclusion that one ballot position is as attractive as another (Appellee's Brief, p. 15). It is worthy of note that appellee mentions no similar success in our own state. The very election which gave rise to the instant case constitutes a factual contradiction to the election of Vincent Impelliteri in New York City. The poll of votes in the instant election revealed that the candidate appearing on the first row received the greatest number of votes, and the remaining candidates received lesser votes, *in the order in which they appeared on the ballot.*

Appellee offers again a non-authoritative statement that the major political parties have acquired a prescriptive right to appear on the first row or rows. Yet this statement meets considerable opposition in the dissent of Mr. Justice Douglas, in *Mac Dougall* v. *Green*, 335 U. S. 281, 61 S. Ct. 1, 93 L. Ed. 3 (1948) wherein it was stated:

> "The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government." 335 U. S. 281 at 288, 289, 290, 61 S. Ct. 1, 93 L. Ed. 3 at 9, 10 (1948).

The cases of *Crane* v. *Voorhis*, 257 N. Y. 298, 178 N. E. 169 (1931) and *Aurelio* v. *Cohen*, 291 N. Y. 176, 51 N. E. 2d 695 (1943) both stand for the proposition that there must be no unnecessary discrimination between the independent candidate and the party voter in respect of the facilities offered.

Therefore appellee has not sustained his burden of satisfying this Court that the questions presented by this appeal are not substantial. Even appellee's discussion of the merits fails to substantiate the position taken.

CONCLUSION

For the reasons stated it is respectfully submitted that the Supreme Court of the United States deny appellee's Motion To Dismiss this appeal, and that plenary consideration be granted on the merits.

Respectfully submitted,

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Counsel for Plaintiff-Appellant,
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East Orange, New Jersey.

PROOF OF SERVICE.

I, Abraham I. Harkavy, Attorney for Samuel Voltaggio, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on DEC 4 1962 I served copies of the foregoing Brief Opposing Appellee's Motion To Dismiss on the several parties thereto, as follows:

1. On Nicholas V. Caputo, County Clerk of the County of Essex, and Robert J. Burkhardt, Secretary of State, State of New Jersey, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

To Nicholas T. Fernicola, Esq., attorney for appellee Nicholas V. Caputo, at Hall of Records, Newark, New Jersey.

To Arthur J. Sills, Esq., attorney for appellee Robert J. Burkhardt, at State House Annex, Trenton, New Jersey.

DEC 4 1962

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FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 559

SAMUEL VOLTAGGIO,

Appellant,

vs.

NICHOLAS V. CAPUTO, County Clerk, County of Essex, State of New Jersey, and ROBERT J. BURKHARDT, Secretary of State, State of New Jersey,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

APPELLEE'S MOTION TO DISMISS APPELLANT'S APPEAL.

NICHOLAS T. FERNICOLA,
Attorney for Defendant-Appellee,
Nicholas V. Caputo,
Hall of Records,
Newark, New Jersey.

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IN THE

Supreme Court of the United States

SAMUEL VOLTAGGIO, Plaintiff-Appellant, *vs.* NICHOLAS V. CAPUTO, County Clerk, County of Essex, State of New Jersey and ROBERT J. BURKHARDT, Secretary of State, State of New Jersey, Defendant-Appellees.	Civil Action. On Appeal. Notice of Motion to Dismiss.

Notice of Motion to Dismiss.

To: Abraham I. Harkavy, Esq.,
Attorney for Plaintiff-Appellant,
100 Evergreen Place,
East Orange, New Jersey.

Sir:

PLEASE TAKE NOTICE that Nicholas V. Caputo, County Clerk, County of Essex, State of New Jersey, the Defendant-Appellee, moves to dismiss the Appellant's appeal and to affirm the Opinion of the Court below, as the Federal questions here presented were not timely raised and that the said questions are not substantial.

NICHOLAS T. FERNICOLA,
Attorney for Defendant-Appellee,
Nicholas V. Caputo.

Appellee's Motion to Dismiss Appellant's Appeal and to Affirm the Opinion of the Court Below.

Appellee submits this brief on motion to dismiss appellant's appeal and asserts that the Federal questions here presented were not timely raised and that the said questions here raised are not substantial.

The Questions Are Not Timely Raised.

The Plaintiff seeking equitable relief should act equitably. The Plaintiff failed to do so—his complaint was filed September 7, 1962 and the election was scheduled for November 6, 1962. He waited to the very last possible moment to bring a judicial challenge. In preparing for an election, it is necessary and required for the state and county, that drawing of specifications of ballots (which differ in each municipality and often, in each ward) must be begun promptly so that sample ballots as well as official ballots may be prepared in time. This action was commenced on the eve of the date for drawings for position.

On March 8, 1962, which was the last day for the receipt of nominating petition for independent candidates, R. S. 19:13-9, R. S. 19:23-40, Plaintiff personally tendered his petition for filing to the Executive officer of the New Jersey Department of State. His petition contained on its face the designation "Life-Long Democrat". Plaintiff was then informed by the Executive officer that the designation was illegal and that the petition could not be accepted in that form. The Plaintiff was informed that he could have a designation including three words which did not include the names of established political parties.

He took no legal action until September 7, 1962, when this Complaint was filed. The General election was held November 6, 1962. It is untimely and the question is now moot.

The Questions Are Not Substantial.

The election has taken place. The question is moot. The Plaintiff was on the ballot. He received a place as did other independent candidates. The number of candidates running were few and his name was before the electorate for voting and the electorate voted.

The New Jersey Statute which prevents an independent candidate from using the word "Democrat" associated with his name on the ballot is constitutional.

The New Jersey Statutes provide three ways by which a candidate may have votes recorded for him at a general election. He may be nominated as a candidate of a party at a primary election. R. S. 19:13-1 et al. Then he may use his party's designation. R. S. 19:14-8 et al.

A candidate may also have his name printed on the general election ballot by means of a direct nomination by petition. R. S. 19:13-1, 3 to 13, et al. He may be referred to as an "Independent" candidate.

Or, a candidate may have votes recorded for himself on the general election by having his name written in or pasted on at the general election ballot. R. S. 19:14-6.

The United States Supreme Court has recognized the importance of the role which political parties play in our system of government and the validity of requirements of state law that party candidates run under their true colors. In *Ray* v. *Blair*, 343 U. S. 214 (1952), the Court stated:

> "As is well known political parties in the modern sense were not born with the Republic. They were created by necessity, by the need to organize the

rapidly increasing population, scattered over our Land, so as to coordinate efforts to secure needed legislation and oppose that deemed undesirable. Compare Bryce, Modern Democracies, p. 546. The party conventions of locally chosen delegates, from the county to the national level, succeeded the caucuses of self-appointed legislators or other interested individuals. Dissatisfaction with the manipulation of conventions caused that system to be largely superseded by the direct primary. * * *" At 220.

"* * * A state's or a political party's exclusion of candidates from a party primary because they will not pledge to support the party's nominees is a method of securing party candidates in the general election, pledged to the philosophy *and leadership* of that party. * * *" At 227. (Emphasis added.)

In that case the Court upheld an Alabama statutory scheme endorsing a bylaw of the Alabama Democratic Executive Committee requiring nominees for Democratic candidate for elector to pledge to vote for the presidential nominee of the Democratic national convention.

The Court discussed many statutory provisions for the regulation of primary elections and the selection of party candidates. It noted that the requirement of a pledge from a candidate participating in a primary election to support at the general election the winner of the primary election is not unusual. At 221. In footnote 8, the Court stated:

"Similar pledges, of course, are frequently exacted of *voters* in the primaries." (Emphasis added.)

In the context of the opinion it seems clear that the Court viewed the requirement of such pledges as constitutional.

Plaintiff, Voltaggio, voted in the Democratic primary in 1962. Under *Ray* v. *Blair* it would be constitutional for New Jersey to require Plaintiff to support in the general election the winner of the Democratic primary election for candidate in the Eleventh Congressional District. Not only does New Jersey not require Plaintiff to support the winner of the Democratic primary, it even permits Plaintiff to run against him. The only condition imposed on Plaintiff by New Jersey is that he may not have the words "Democrat" or "Democratic" printed immediately under his name on the general election ballot. New Jersey law does not prevent Plaintiff from advertising or publicizing to the electorate in any manner he sees fit what his past association with the Democratic party may have been. The only thing it prevents him from doing is to use the official general election ballot to ass rt that he is a Democrat when in fact he is not the candidate of the Democratic party.

Plaintiff implies that party candidates are given an unrestricted right to use a political slogan on the official ballot while independent candidates have a more limited right. This implication is the exact opposite of the truth. A party candidate has no right at all to have a slogan printed following his name on the official ballot. R. S. 19:14-6 and R. S. 19:49-2 (in the case of Automatic Voting Machines) provide that there shall be printed the name of the party to the left of the row. There is no provision for the printing of the name of the party or of any political slogan immediately in association with the name of any candidate of a party. The only words appearing in the block for a party candidate for a member of the House of Representatives are the name of the candidate. R. S. 19:14-8. That the

practice conforms to the statutory scheme is illustrated by a typical ballot from the most recent election for member of the House of Representatives from the 11th congressional district which is attached to this brief and marked Exhibit A.

An independent candidate is granted the right to have printed immediately following his name on the official ballot a designation of the "party" or principles which he represents. R. S. 19:14-10; R. S. 19:13-4. No decision of the United States Supreme Court has been found which holds that a candidate has a constitutionally protected right to have printed on the official ballot immediately following his name a designation of party or principles. The grant by New Jersey of this right to an independent candidate is over and above the constitutional minimum which it must afford. Therefore, it may impose any reasonable condition on the grant of this right. It seems self-evident that it is reasonable to impose as a condition that the designation chosen not include the very name of an established and well-known political party. If Plaintiff should eventually prevail and have the word "Democrat" printed closely following his name on the general election ballot there would then be discrimination against the Democratic candidate who has no right under New Jersey law to have any designation printed immediately following his name. Such discrimination against the Democratic candidate would be further aggravated if Plaintiff also prevailed on the other major point in the case and had his name placed in the area on the ballot where the experienced voter has come to expect the Democratic candidate's name to appear.

It is submitted that Plaintiff, when challenging the constitutionality of a statute, has the burden of showing that the Legislature could not reasonably have believed that the use of a slogan including the word "Democrat" would possibly confuse the electors. The Legislature has power to prevent the possibility of confusion under U. S. Const. Art. I, sec. 4, cl. 2.

Plaintiff submits no factual proof nor cites any case in which a statute similar to R. S. 19:13-4, protecting any established political parties from use of their names by other groups, was held violative of the Constitution of the United States.

In re Greene, 9 App. Div. 223, 41 N. Y. S. 177 (1896), permitted the use of the designations both "National Democratic Party" and "Democratic Party". But there was a long factual history in that case indicating that no single political group had become exclusively identified as the Democratic Party. This was a 3-2 decision, with a strong dissenting opinion. A much more recent case from the same state, *Marcantonio v. Hefferman*, 192 N. Y. Misc. 868, 83 N. Y. S. 2d 364 (1948), forbade the use of the designation "United Labor Party" as violative of a statutory provision practically identical with R. S. 19:13-4 protecting in that instance the right of the "American Labor Party", an established political party, against the use of any part of its name by another group. The Court distinguished the *Greene* case on the ground that no statute similar to R. S. 19:13-4 was involved in that case.

Philips v. Curtis, 4 Idaho 193, 38 P. 405 (1894), is not a case in which two similar names appeared on a ballot. Neither is it a case in which an established political party

invoked statutory protection of its name similar to that afforded by R. S. 19:13-4. There, petitions nominating independent candidates under the designation "People's Party" and "Electors' People's Party" were presented. The former petition was rejected by the filing office for formal defects not related to the name. The Court upheld this administrative determination. The administrative officer accepted for filing the petition of the "Electors' People's Party."

State v. *Gifford*, 22 Idaho 613, 126 P. 1060 (1912), may be distinguished on the same grounds as *Phelps* v. *Curtis*.

In *State* v. *Arms*, 24 Mont. 447, 63 P. 401 (1900), the designations "Bryan Democratic" and "Democratic" were both permitted on the ballot. Again, no statute similar to R. S. 19:13-4 was involved. The objectors could only rely on general equitable principles against confusion. But the factual history showed that both factions so designated were well known to the public and confusion would not occur. Each faction conducted its own convention and primary throughout the state.

For other examples of this approach by the Montana court, see *State* v. *Moran*, 63 P. 390 (1900) (forbidding the use of the designation "Eight Hour Republicans") and *State ex rel. Gillis* v. *Johnson*, 46 P. 440 (1896) (permitting the use of the designation "Silver Republican Party").

For general authority on the right of a party to protection against the use of its name by others, see *Fagan* v. *O'Connor*, 169 N. Y. Misc. 466, 8 N. Y. S. 2d 56 (Supreme Ct. 1938); Gassman, *Election Law*, Sections 43 and 87 (1957).

New Jersey Law makes no unconstitutional delegation of discretion to determine the position of candidates on the ballot.

The county clerk has no discretion in determining the sequence of positions of candidates for a given office on the general election ballot. R. S. 19:14-6 and R. S. 19:49-2 reserve the top rows on Automatic Voting Machines to parties which polled 10% of the total vote at the preceding election for members of the General Assembly, R. S. 19:1-1. At the present time, as a matter of fact there happens to be two such parties in New Jersey; the Republican Party and the Democratic Party. Thus the top two rows on Automatic Voting Machines are set aside under the existing facts and law for these two parties. The determination of which of the two parties gets the first row and which gets the second is determined by a drawing by lot according to a carefully specified statutory procedure. R. S. 19:14-12. The remaining rows are reserved for candidates nominated by petition, i. e., independent candidates such as plaintiff. R. S. 19:14-6. The sequence of positions on the ballot of independent candidates is also determined by a drawing by lot by the county clerks. R. S. 19:14-12. This is made particularly clear by consideration of the last paragraph of R. S. 19:14-12 which refers to "the drawing for the position which the name of candidates * * * nominated by petition * * * shall occupy on the general election ballot * * *." An earlier paragraph of this section reads in part: * *.

> "Where there is but one person to be elected to an office, the names of the several candidates *who have filed petitions* for such office shall be written upon cards of the same size, substance and thickness." (Emphasis added.)

This sentence can only refer to candidates nominated by petition. It would be contradictory if applied to party candidates whose place on the party row of an Automatic Voting Machine is reserved by the statutory provisions discussed above. The third paragraph of R. S. 19:14-8 also makes this clear. It is submitted that the statement in *Perry* v. *Guiliano*, 46 N. J. Super. 550 (App. Div. 1957), which may seem to imply that the county clerk need not determine the sequence of independent candidates by lot, but by some other method, is not the law in New Jersey. In *Perry* v. *Guiliano* plaintiffs sought to compel the county clerk to determine the sequence of positions of independent candidates by a manner other than by lot. Plaintiff was denied such relief. No New Jersey Court has ever held that the sequence should be determined in any other way than by lot. It is submitted that R. S. 19:14-12 and associated statutes make it clear that the sequence must be determined by lot. Any discretion as to position of independent candidates which the county clerk has does not include within its scope the sequence of the names.

In the present case the county clerk determined the sequence of independent candidates by lot.

Even if the New Jersey Legislature did delegate to an administrative officer some discretion in determining the sequence of independent candidates, this would not violate U. S. Constitution, Art. I, Sec. IV, Clause 1. This provision of the Constitution provides:

> "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof . . . ."

Plaintiff urges a literal reading of the word "Legislature" in this provision as forbidding any delegation whatsoever by the Legislature to any other state agency. A contention that the word "Legislature" in this provision should be given a literal reading was expressly rejected by the Supreme Court in *Smiley* v. *Holm*, 285 U. S. 355 (1932). In that case the Minnesota Legislature passed a bill reapportioning the congressional districts. But the Governor vetoed it. Under the Minnesota Constitution, normally the Governor's veto would prevent a bill from becoming law. It was contended, however, that Article I, Sec. 4, Clause 1 of the United States Constitution superseded the State Constitution and delegated the power to regulate congressional elections to the Legislature to the exclusion of any participation by the Governor. The Court held that the term "Legislature" does not refer to the law-making "body" but to the law-making "function". At 365, the Court stated:

> "* * * We find no suggestion in the federal constitutional provision of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted. Whether the Governor of the state, through the veto power, shall have a part in the making of state laws, is a matter of state policy. Article 1, § 4, of the Federal Constitution, neither requires nor excludes such participation." At 367.

Similarly, it is a matter of State policy whether an administrative official may share the law-making function to the extent of making certain specific determinations.

Plaintiff has no constitutionally protected right to a chance to appear on the first row on the voting machine.

New Jersey law defines as a political party a party which at the preceding election for members of the General Assembly polled at least 10% of the total vote cast in the state. R. S. 19:1-1. To parties so defined it reserves the top rows on Automatic Voting Machines. R. S. 19:14-6 and 19:49-2. Other groups are not barred from placing the name of a candidate on the ballot. All they have to do to have the name of a candidate for Member of the House of Representatives printed on the ballot is to file a petition in proper form containing only 100 signatures. R. S. 19:13-3. This is a tiny fraction of the total population of the typical congressional district which averages about 400,000. It is only half the number of signatures which a candidate for the nomination of his party must obtain to get his name on the primary election ballot; R. S. 19:23-8 requires a candidate seeking his party's nomination for Member of the House of Representatives to file a petition with 200 signatures.

The United States Supreme Court has held that a state may keep a party and its candidates off the general election ballot altogether where they fail to meet a requirement of state law that they file petitions demonstrating substantial support. *MacDougall v. Green*, 335 U. S. 281 (1948). In that case Illinois required a petition containing at least 200 signatures from each of at least 50 of the 102 counties in the state. When the Progressive Party failed to satisfy this requirement, Illinois ruled that the nominating petition was "not sufficient in law to entitle the * * * candidates' names to appear on the ballot." The Court upheld this ruling.

New Jersey has imposed no such drastic requirement on independent candidates. Plaintiff could have earned a place in the top rows in the 1962 general election by being sponsored by a group which in 1961 polled 10% of the total vote in the state. Having failed to demonstrate such support in advance, New Jersey does not keep him off the ballot altogether as Illinois did to the candidates in *MacDougall* v. *Green*; it still permits him to have his name on the ballot by filing a petition with only half as many signatures as the party candidates had to file. Since New Jersey's treatment of independent candidates in these respects is less drastic than that of Illinois which was held constitutional in *MacDougall* v. *Green*, it also should be held constitutional.

New Jersey law does attempt to afford the independent voter facilities for prompt, intelligent and ready expression of his voice. New Jersey mails a sample ballot to each registered voter several days prior to the general election, R. S. 19:14-25, which is a facsimile of the official ballot appearing on the voting machine, R. S. 19:49-4 and R. S. 19:14-22. There is no constitutional requirement that sample ballots be mailed to each registered voter. Many states do not use sample ballots. By mailing out sample ballots, New Jersey provides every voter, whether an independent or a member of a party, with a full opportunity to study the ballot and determine the position of the candidates for whom he intends to vote. It may also be noted that the possibility of difficulty in locating the name of a candidate on a general election ballot in the Eleventh Congressional District of New Jersey is practically non-existent. It is a relatively short, clear ballot unlike those of some other states. See Exhibit A to this brief.

It is submitted that *in vacuo* one block on the ballot is just as attractive to the voter as any other. The Court may take judicial notice of the fact that Vincent R. Impellitteri was elected mayor of the City of New York running on row G on Automatic Voting Machines in 1950. However, since for many years in New Jersey the law has provided that the top rows on Automatic Voting Machines shall be reserved to parties which obtain 10% of the vote at the preceding election for members of the General Assembly, the electorate has come to expect that the party rows will be at the top of the ballot and the independent rows will be below them. To frustrate this expectation now would cause confusion to the electorate. He was not denied the opportunity; he could have run with other candidates for first position; he excluded and precluded himself by refusing to enter the primary—a condition precedent to qualifying for the drawing.

There is no proof submitted that No. 1 position guarantees lesser or greater votes. The political parties of this state cannot receive immunity against loss merely by the first position on the ballot.

The plaintiff did not enter the primary for fear he would have been eliminated and did not want to have a contest for the designation for the office.

In *McGowan* v. *State of Maryland*, 366 U. S. 420, 81 S. Ct. 1101 (1961). Defendants appealed convictions of violating Sunday closing laws, claiming that the statutes bring about a denial of equal protection of the laws and due process. This court held that the Fourteenth Amendment permits States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others;

the constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective; State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality; a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Also in *Williamson* v. *Lee Optical Co.*, 346 U. S. 483, 75 S. Ct. 461, 99 L. Ed. S. 63, an Oklahoma statute was attacked as contra the Equal Protection Clause of the 14th Amendment because it forbids an optician from fitting or duplicating lenses without a prescription but that it did not apply to sellers of ready-to-wear glasses. Here it was held that the traditional test under the Equal Protection Clause has been whether a state has made "an invidious discrimination". Universal equality is not the test, there is room for weighing. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

Conclusion.

For the reasons stated it is respectfully submitted that the Supreme Court of the United States dismiss this Appeal and affirm the decision of the Court below.

Respectfully submitted,

NICHOLAS T. FERNICOLA,
Attorney for Defendant-Appellee,
Hall of Records,
Newark, New Jersey.

Proof of Service.

I, Nicholas T. Fernicola, attorney for Nicholas V. Gaputo, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on November 15, 1962, I served a copy of the foregoing Appellee's Motion to Dismiss Appellant's Appeal and Notice of Motion to Dismiss, by mailing 5 copies in duly addressed envelope, Certified Mail, Return Receipt Requested, as follows.

1. On Abraham I. Harkavy, attorney for Samuel Voltaggio, Appellant, 100 Evergreen Place, East Orange, New Jersey.

Exhibit A.

Voting Machine Sample Ballot.
General Election, November 8, 1960.

(See Opposite ☞)

City of East Orange

[illegible] WARD

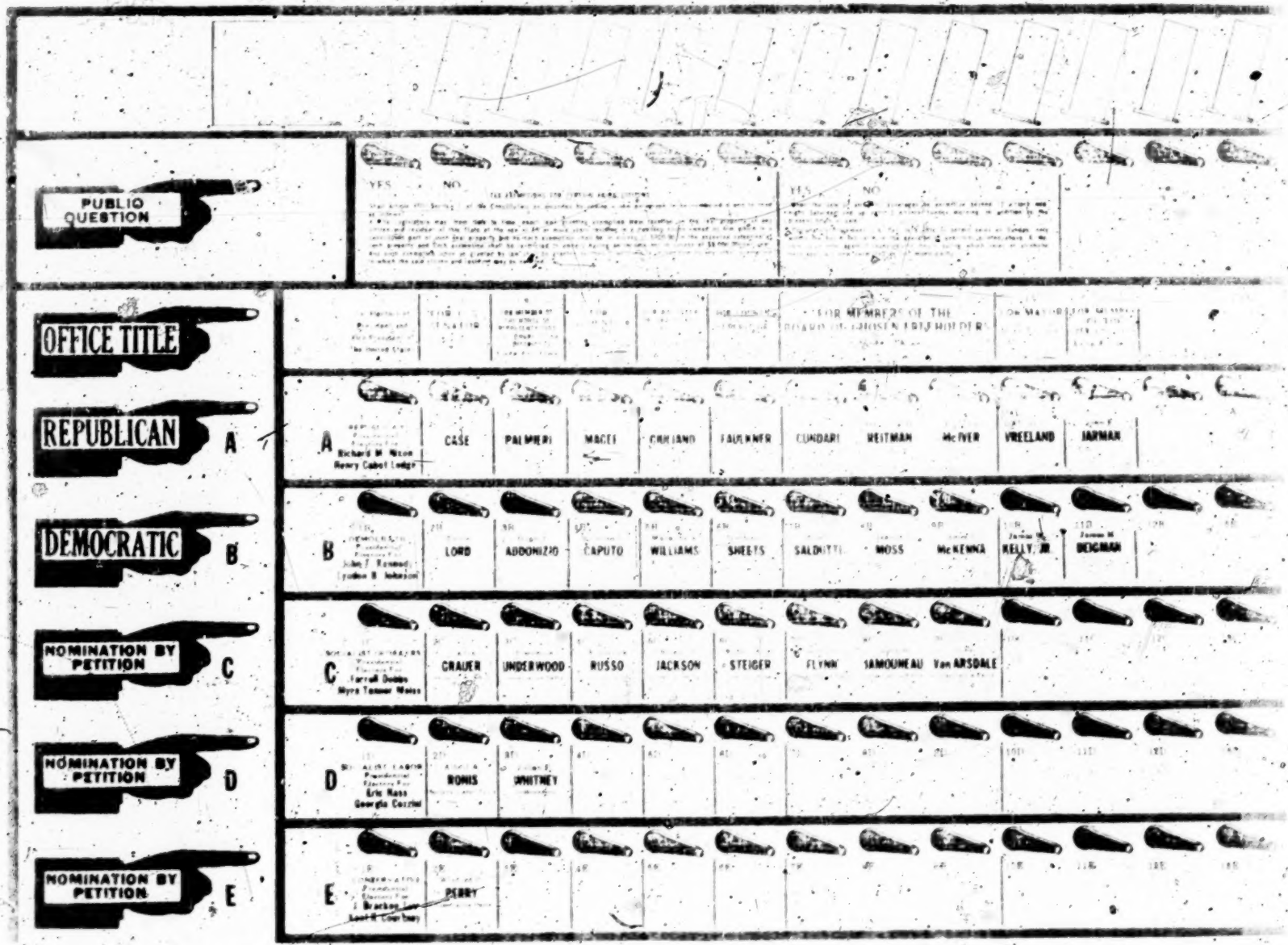
SECOND ELECTION DISTRICT

The Polling Place for this District is Disciples of Christ Church, 78 Park Avenue

VOTING MACHINE SAMPLE BALLOT

General Election, November 8, 1960

(POLLS OPEN FROM 7 A.M. TO 8 P.M.)



(POLLS OPEN FROM 7 A.M. TO 8 P.M.)

PUBLIC QUESTION

OFFICE TITLE

REPUBLICAN A

DEMOCRATIC B

NOMINATION BY PETITION C

NOMINATION BY PETITION D

NOMINATION BY PETITION E

A	CASE	PALMER	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	WELLAND	[illegible]	
B	LORD	ADDONIZIO	CAPUTO	WILLIAMS	SHEETS	SALDITT	MOSS	McKENNA	KELLY, JR	[illegible]	
C	CRAIER	UNDERWOOD	RUSSO	JACKSON	STEIGER	FLYNN	[illegible]	[illegible]			
D	BOWIS	WHITNEY									
E	PERRI										

VOTERS ATTENTION!

[illegible] yourselves with this ballot and instructions [illegible] detail prior to voting and save time on Election Day.

IMPORTANT!

All voters who can should vote early in the day and thus avoid possibility of congestion and inconvenience to themselves and others near the close of the polls.

INSTRUCTIONS TO VOTERS